



NEPA, Endangered Species, and Climate Intervention

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NEPA and Climate Change



- Earliest of federal environmental statutes (1970) – broad
- Applies when “major federal action” “significantly affects” “quality of human environment”
 - Federal, not state (although beware state mini-NEPAs)
 - “significantly affect” includes
 - Controversial; precedent-setting; unique; cumulative impacts
 - Requires context + intensity
 - Intensity: highly controversial, cumulative, others
 - Both direct and indirect effects, cumulative as well
- CEQ Guidance on GHG Effects: social cost of carbon; **withdrawn**
- *Sierra Club v. FERC* (D.C. Cir. 2017) – Natural Gas Act section 7 CCN; APA challenge; “indirect actions”; FERC’s power to reject

Endangered Species Act – a Roadmap



- Protects “endangered” and “threatened” species
 - “In danger of extinction” or “likely to become endangered” through all, or a significant portion, of its range
 - Must be listed (section 4) using “best scientific and commercial data available”, including critical habitat
 - Candidate Conservation Agreements



Endangered Species Act – a Roadmap

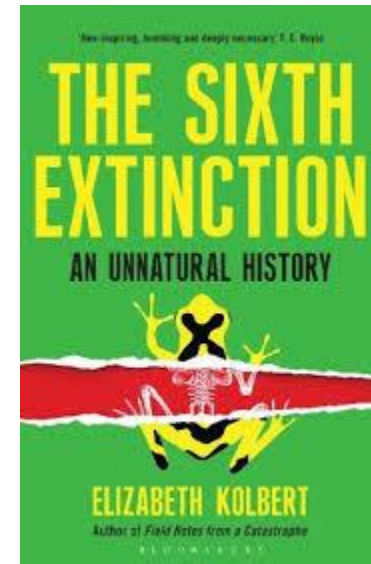
- Section 7
 - Federal consultation requirement
 - No jeopardy determination
 - Requires either biological assessment or biological opinion
 - From U.S. Fish & Wildlife Service or National Marine Fisheries Services
 - Incidental Take Permit (or God Squad)
- Section 9
 - No “taking” of endangered species (special listing rules)
 - Plants too if protected by state law
 - Habitat Conservation Plans
- Citizen suits and listing petitions

Species That Cannot Survive without Climate Intervention?



Climate Change and ESA

- Key questions:
 - When to list a species that faces long-range threat from climate change? These species will also drive reviews of climate intervention proposals
 - When to require consultation for federal actions that affect climate?
 - When does an action affecting climate result in a taking? When is it required to prevent a taking?



Test cases

- Polar bear litigation
- Staghorn coral
- Bearded seals



- Upswing in cases: giraffes, lobsters, walruses, arctic grayling, pikas

Recent regulatory initiatives on ESA

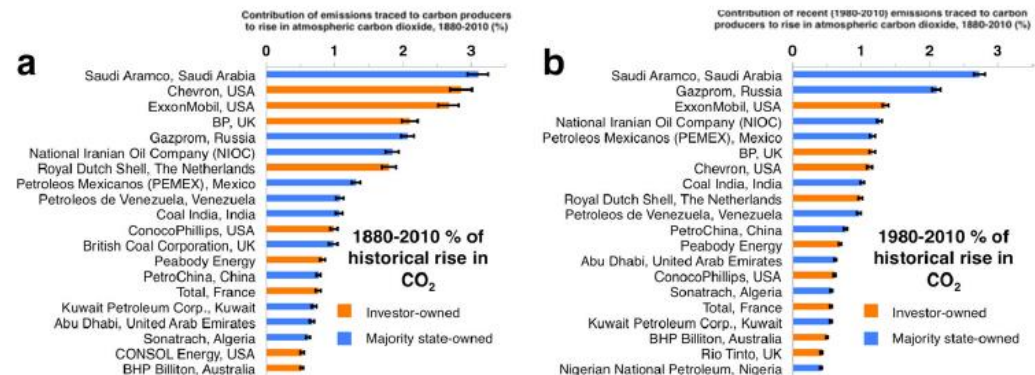
- DOI finalized rules on August 27, 2019 to clarify the operation and scope of listing decisions and consultation requirements
- Key climate change concern: proposal that agencies need not consult on “global processes” - ***postponed***
- Also changes to special 4d rules for threatened species
- Litigation firestorm has already begun – *Center for Biological Diversity v. Bernhardt* (N.D. Cal. 2019)



Application to Climate Intervention Projects

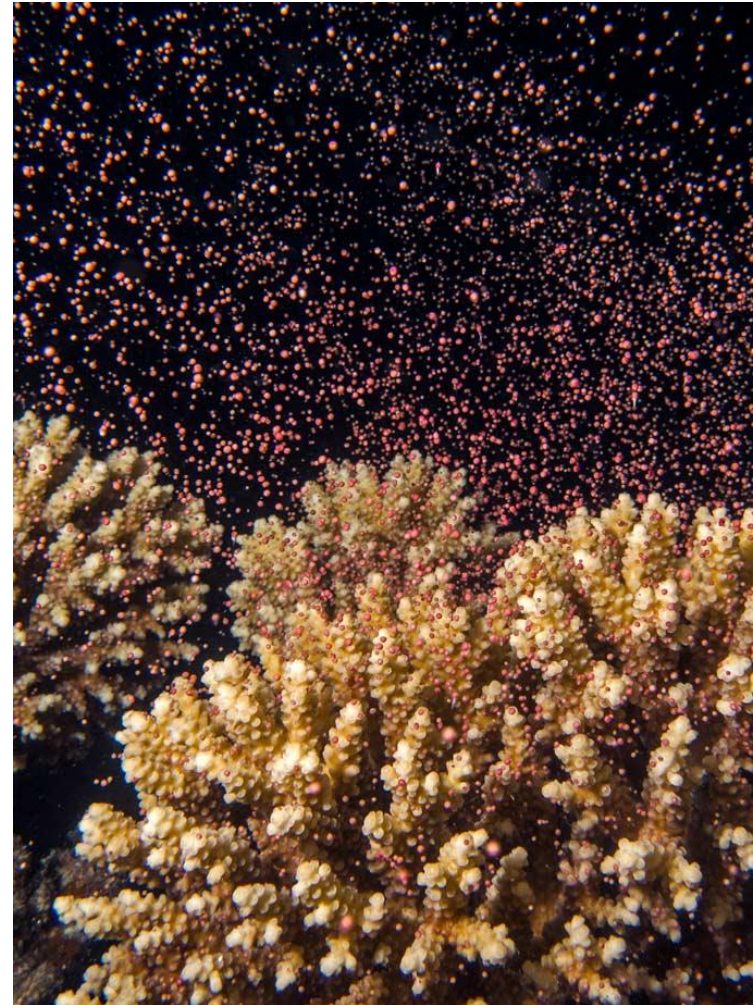


- NEPA EIS for federal agency permits (standing?)
- Section 7 consultation on federal actions that involve climate intervention projects
- Section 9 liability for harm to protected species
- Mandate for action if intervention required for species survival?
- Attributing intervention effects to federal action and species impacts



Staghorn coral and intervention to protect reefs

- Staghorn coral listed as critically endangered species
- Recent proposals to study local climate intervention to protect reefs (Great Barrier Reef)
- ESA and NEPA implications if used in Florida or other state?



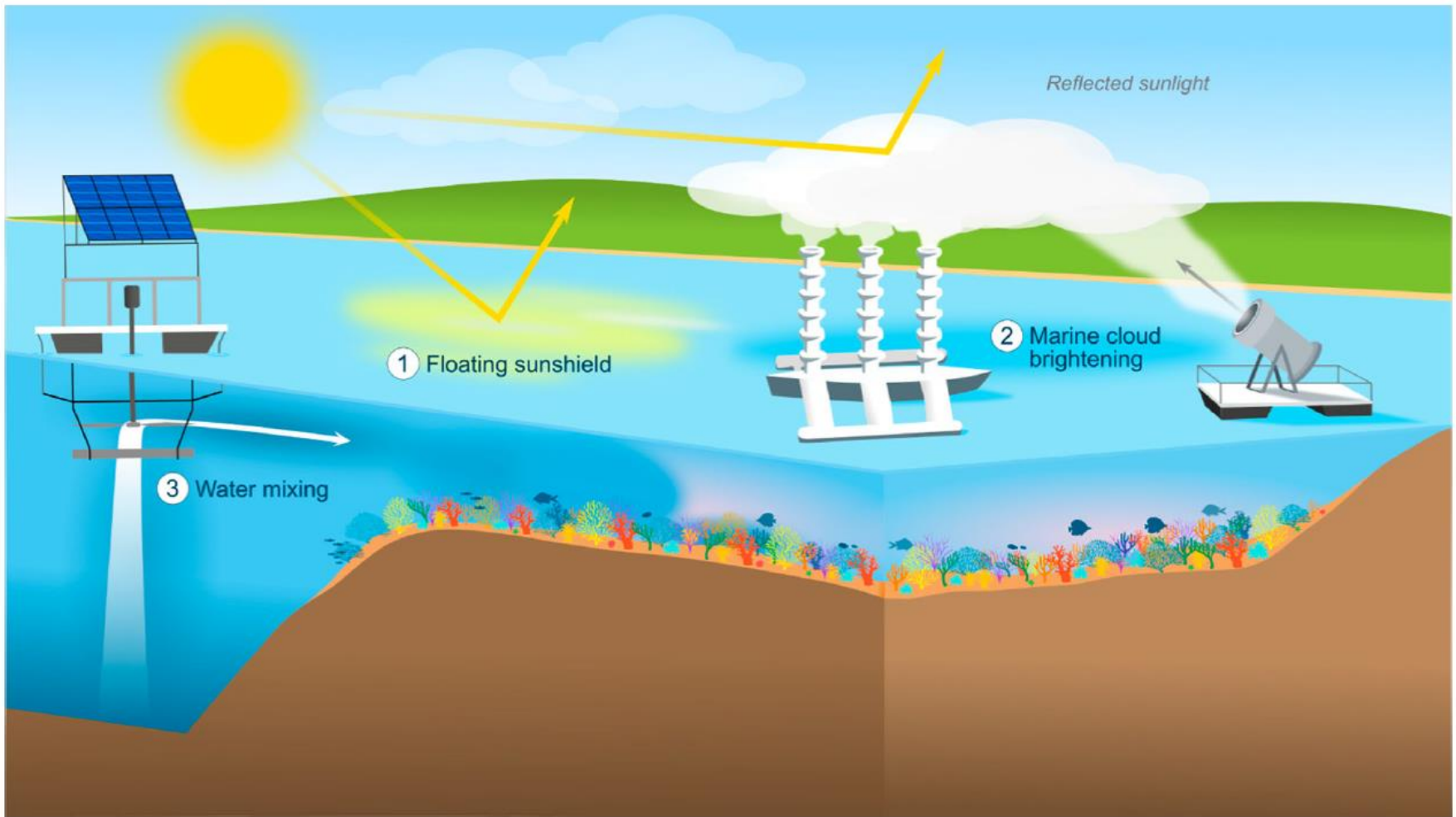


Figure 1. Funding has been awarded for feasibility studies of three geoengineering technologies to protect the reef: (1) a 'floating sunshield' of reflective surface film made of calcium carbonate to reflect sunlight and lower water temperatures; (2) marine cloud brightening; and (3) water mixing.



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